BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PETER GONZALES	)	
Claimant	)	
	)	
VS.	)	
	)	
PTMW, INC.	)	
Respondent	)	Docket No. **1,055,497**
	)	
AND	)	
	)	
STANDARD FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 14, 2011 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

ISSUES

The Administrative Law Judge (ALJ) found claimant's series of accidental injuries arose out of and in the course of employment and that the date of accident was April 20, 2011, when claimant gave written notice of the repetitive accident.

Respondent requests review of whether claimant's alleged back injury arose out of and in the course of respondent's employment and whether claimant provided timely notice of the accident.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

Having reviewed the entire evidentiary record, this Board Member makes the following findings of fact and conclusions of law:

In her preliminary hearing Order, ALJ Rebecca Sanders found that claimant sustained a series of repetitive injuries and that such injuries arose out of and in the course

of his employment with respondent. The ALJ found that the date of the repetitive trauma was the date on which the respondent received written notice of the alleged injuries, April 20, 2011. The ALJ further found that notice of the accident was timely provided to respondent. Temporary total disability benefits and medical treatment were awarded. The outcome of this review hinges on whether the claimant sustained his burden of proof that he suffered from a series of repetitive accidents arising out of and in the course of his employment with respondent and whether the date of accident was correctly determined by the ALJ. As noted by respondent's counsel at the September 13, 2011 preliminary hearing, ". . . if it is a repetitive trauma injury, there would be no notice defense."[1]

The record on appeal is the same as that considered by the ALJ and consists of the transcript of preliminary hearing dated September 13, 2011, with exhibits, together with the pleadings contained in the administrative file.

Claimant alleges that he suffered a series of repetitive traumas through January 11, 2011. Prior to that date the claimant worked for respondent for approximately 13 years. Respondent is in the business of fabricating railroad signal houses. Claimant's job was in the shipping and receiving department. There is no dispute regarding the nature of claimant's job duties. Claimant described his job as "very physical"[2] which included squatting, pulling, and lifting from 5 -10 pounds to 100 pounds or greater. For the heavier boxes and crates, claimant had mechanical assistance consisting of pallet jacks, some of which had to be pushed and pulled manually. Claimant worked in shipping and receiving for approximately one year. Before that he was a lead person in the finish department, which also required lifting, pulling, and pushing.

Claimant developed back pain in 2008. His symptoms progressively worsened due to lifting, bending, pushing, and pulling. The back pain ultimately became severe and he developed radicular symptoms.

Claimant last worked for respondent on January 11, 2011. On that day, claimant was engaged in what he described as "checking in an outsource material", which required ". . . a lot of lifting and bending and stooping. . . ."[3] When claimant went home on January 11, 2011, his back and lower extremities were hurting, right greater than the left.

Commencing on January 7, 2011, claimant began receiving conservative medical treatment on his own from his personal care provider, Dr. John Rockefeller. After he returned home on January 11, 2011, the claimant did some snow shoveling. According to claimant, the snow shoveling did not worsen his back and leg pain. Claimant underwent

---

[1] P.H. Trans. at 4.

[2] *Id.* at 8.

[3] *Id*. at 11.

an MRI scan of his lumbar spine on January 19, 2011, and was ultimately referred to Dr. Matthew Wills, a neurosurgeon. Dr. Wills performed surgery consisting of a lumbar decompression and fusion at L4-5 on March 16, 2011. Claimant denied working or earning wages of any kind since January 11, 2011. When asked why he did not report a work-related injury to the respondent on January 11, 2011, the claimant answered, "Cause I wasn't aware of the knowledge of what was going on with my back."[4]

Claimant testified that he was unaware that his back problems were related to his work until he had discussions with the doctors, such discussions having occurred both before and after the March 16, 2011 surgery. After he last worked for the respondent, claimant commenced a period of leave under the Family and Medical Leave Act (FMLA). Claimant was told that his FMLA leave would expire on March 14, 2011, however, the claimant consulted an attorney, David Shriver, who advised respondent by correspondence dated March 18, 2011, that the correct date for the FMLA benefits to expire was April 6, 2011. Mr. Shriver's letter made no reference to an injury or series of injuries.[5]

Claimant admitted that he had two prior workers compensation claims and that he was aware of respondent's reporting requirements. He also admitted that respondent's requirements regarding reporting work-related injuries were embodied in a personnel handbook. Claimant received, and signed for a revised version of the handbook on January 6, 2011. Claimant testified that following January 11, 2011, he called the respondent and talked to Janice Bates, the human resource manager. He told Ms. Bates that he had ". . . some sort of back injury and I didn't know at the time how it occurred or what had happened."[6]

Claimant admitted that the first time respondent would have had any knowledge that any alleged work-related injury was on April 20, 2011, when respondent received Jeff Cooper's April 19, 2011 letter.[7] Claimant admitted that he believed he sustained a work-related injury before his surgery on March 16, 2011. He also admitted shoveling snow in December 2010, however, claimant denied that such shoveling served to worsen his back. Claimant's two previous workers compensation claims involving knee and forearm injuries were singular, traumatic events rather than injuries which developed and worsened over time.

Janice Bates also testified at the preliminary hearing. Claimant began taking sick leave on January 12, 13, and 14, 2011. At some point, Ms. Bates had a conversation with

---

[4] P.H. Trans. at 18.

[5] *Id.*, Resp. Ex. D.

[6] *Id.* at 16.

[7] *Id.* at 31-32; Cl. Ex. 3.

claimant in her office. In that discussion, claimant told Ms. Bates that he had injured his back while shoveling snow. Relying on what the claimant told her, Ms. Bates commenced the process of initiating claimant's leave under FMLA. Ms. Bates denied that claimant ever told her about his work causing any injury or injuries. She first became aware of claimant's alleged work-related injuries when she received Mr. Cooper's letter on April 20, 2011. The employment documents contained in respondent's exhibit A, which include benefit usage forms documenting the reasons given by claimant for calling in sick, do make reference to "back issues" and "pinched nerve in back." However, they make no reference to any claimed work-related injury or injuries.

Both parties offered medical records and reports into evidence at the preliminary hearing, set forth in claimant's exhibits 1 and 2 and respondent's exhibits B and C. Claimant called Dr. Rockefeller's office on January 7, 2011, and reported a three-day history of back pain. In his visit to Dr. Rockefeller's office on January 12, 2011, claimant reported back and right leg pain which had been hurting for two weeks. Claimant also stated that his symptoms were aggravated by lifting and bending and that his job requires frequent lifting. He called Dr. Rockefeller's office on January 13, 2011, and reported an incident involving his back while at work that same day, however, the parties do not dispute that claimant's last day at work for respondent was January 11, 2011.

Dr. Wills' report to Dr. Rockefeller dated March 7, 2011, contains the following history:

> He has had some back pain on and off for the past several years. He said it was enough he had mentioned it to you [Dr. Rockefeller] about six months ago then he had some significant decline or deterioration in December while shoveling snow. Since that time, he has had severe pain across his low back with radiation down his right leg. The pain radiates into his lateral calf and into the top of his foot. He is developing weakness in his foot and an abnormal gait.

However, in the same report, Dr. Wills comments that claimant's job requires that he lift 50 pounds fairly frequently and that post-surgically the claimant might not recover ". . . full work ability for heavy manual labor."

Dr. Pedro Murati examined claimant at the request of his counsel on June 14, 2011. Dr. Murati's report contains a history of claimant sustaining injury on January 11, 2011, while doing a lot of lifting and measuring of parts. Dr. Murati concludes that claimant's low back problems are a direct result of the January 11, 2011 work-related injury. But, Dr. Murati's report also says that the claimant had noticed back pain on and off while working because he would bend, lift, squat, push and pull parts on a daily basis. Drs. Murati, Rockefeller and Wills all imposed light duty restrictions at various times, however, none of those physicians was authorized.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[11] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[12] An injury is not compensable, however, where the worsening

---

[8] K.S.A. 2010 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Id.* at 278.

[11] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[12] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[13]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

---

[13] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

In *Saylor*[14], the Kansas Court of Appeals approved a date of accident after a claimant's last day worked, stating:

> . . . [T]he 2005 addition to K.S.A. 2008 Supp. 44-508(d) creates the presumption that the legislature intended to change the date of injury for an "accident" from the bright-line rule of the last day worked. Therefore, giving effect to the express language in K.S.A. 2008 Supp. 44-508(d), which is plain and unambiguous, we find Saylor's date of accident to be March 28, 2006.

ANALYSIS

In the opinion of this Board Member, claimant has sustained his burden of proving by a preponderance of the credible evidence that he suffered personal injury by a series of repetitive traumas arising out of and in the course of his employment for the respondent. Claimant had experienced back problems for a significant period of time before January 11, 2011, however, his back and radicular symptoms gradually worsened as he continued to perform his work for respondent. The undisputed evidence is that claimant's work for respondent required lifting of weights up to approximately 100 pounds, bending, stooping, pushing, and pulling. Claimant testified that over time his work duties for respondent worsened his low back and leg symptoms, which ultimately became severe and continued until claimant's last day of work, January 11, 2011. The evidence in the record is conflicting on this issue, but a preponderance of the credible evidence supports the ALJ's findings.

There is evidence which indicates that claimant engaged in some snow shoveling, although when that activity occurred is unclear. It is likewise unclear whether shoveling snow served to cause or aggravate claimant's back and lower extremity symptoms. The testimony of Janice Bates and the report of Dr. Wills tend to support the conclusion that the snow shoveling did cause or contribute to claimant's low back injury, although claimant testified that the snow shoveling resulted in no change in his condition. He had the same symptoms before and after the snow shoveling. The records of Dr. Rockefeller indicate that the claimant stated that his back and leg pain were aggravated by lifting and bending, and that his work requires frequent lifting. Dr. Wills also mentions heavy manual labor and lifting up to 50 pounds fairly frequently in connection with the claimant's work requirements. Dr. Murati also makes reference to claimant's work as requiring significant physical exertion.

Claimant testified that he had two previous workers compensation claims and that he was aware of respondent's reporting requirements. However, those previous injuries involved specific, singular, traumatic events rather than injuries which occur over a period

---

[14] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 1048, 207 P.3d 275 (2009), *aff'd* ___ *Kan.*___, 256 P.3d 828 (2011).

of time. The evidence reflects that the claimant was unsure about the cause or causes of his condition and whether he should or should not report this to respondent as a workers compensation injury.

This Board Member finds that where there is conflicting testimony, as in this claim, the credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the testimony of claimant and Ms. Bates. Some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify.

CONCLUSION

1) Claimant suffered personal injury by accident by a series of repetitive accidents that arose out of and in the course of her employment with respondent.

2) The ALJ correctly found the date of accident to be April 20, 2011. The date of accident in a claim involving a series of repetitive trauma is governed by K.S.A. 44-508(d). Claimant was not taken off work or provided physical restrictions by any authorized physician. Hence, the date of accident must be the earliest of two dates: the date upon which the employee gives written notice of the injury to the employer or the date the condition is diagnosed as work-related, provided such fact is communicated in writing to the employee. There is no evidence that the claimant was ever provided with a written diagnosis that the injury was work-related. Therefore, the date of accident is April 20, 2011, the date the respondent received the April, 19, 2011 correspondence from claimant's counsel.

3) Notice is timely pursuant to K.S.A. 2010 Supp. 44-520.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[16]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated September 14, 2011, is affirmed in all respects.

IT IS SO ORDERED.

---

[15] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[16] K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of November, 2011.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge